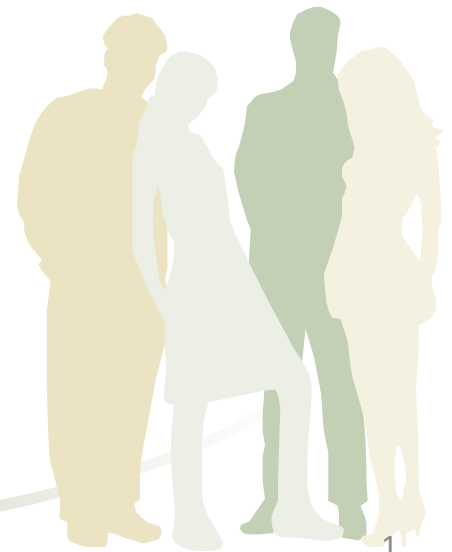




Common Ownership Communities Collection Issues

Judge Eugene Wolfe
Judge Patricia Mitchell
Judge Gary Everngam

June 10, 2015





Object Of This Presentation

- Review the legal nature of common ownership communities
- Address the differences between condominiums and home owners associations
- Explain the Court's role in the collection process
- Identify common issues related to collection of delinquencies from common ownership community owners
- Identify common issues related to defenses raised by owners in common ownership community collection cases
- Suggest how the process may be made to be more fair to all concerned.



Nature of Common Ownership Communities

- Common ownership communities are “government-like” associations made up of the owners as a whole
- Common ownership communities may be either incorporated or non-incorporated
- They are subject to federal, state and local law
- The membership as a whole governs the individual member’s use, possession, and enjoyment rights and obligations
- Examples of common ownership communities
 - Home owners’ associations (HOAs)
 - Condominium associations
 - Mutuels/Cooperatives



Law Governing Common Ownership Communities

- Federal Law
 - The Constitution of the United States
 - Federal Fair Housing laws
 - The Fair Debt Collection Practices Act (FDCPA)
- State Law
 - Maryland Constitution
 - Maryland Common Law
 - Maryland Statutes
- Local Law
 - County common ownership laws
 - County zoning, building and use codes etc.



Fair Debt Collection Practices Act

- (5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.
- (6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. (Person who collects debts for another.)



Fair Debt Collection Practices Act -- Continued

- **§ 808. Unfair practices [15 USC 1692f]**
- A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
 - (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.



Fair Debt Collection Practices Act--Continued

- **§ 813. Civil liability [15 USC 1692k]**
- (a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of --
 - (1) any actual damage sustained by such person as a result of such failure;
 - (2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1,000; or
 - (B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector; and
 - (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.



Governing Documents

- Subject to federal, state and local law, the affairs of a common ownership community are governed by the community's governing documents.
- Governing documents may include
 - Articles of incorporation
 - The declaration
 - Bylaws
 - Rules and regulations



Order of Precedence

- The general order of precedence is
 - U.S. Constitution
 - Federal law
 - State Constitution
 - State statutes
 - State regulations
 - Local laws and regulations
 - The community's declaration/articles of incorporation
 - The community's bylaws
 - The community's rules



The Court Process

- It is the Court's obligation to resolve disputes.
- The Court must apply controlling authority in the correct order of precedence.
- The Court's ultimate obligation is the same whether or not the case is contested.
- Generally, the Court does not raise defenses.
- In consumer debt cases the Court may insure that the requirements of the FDCPA are being followed.
- If a case is uncontested (no NOID), and the complaint supports liability, liability is admitted, but the court must be satisfied that the damages (\$\$\$\$) claimed are correct.
- If an uncontested case does not state a legal basis for the claim or if the amount of damages are unclear, affidavit judgment cannot be entered.



A Couple of Definitions

- **Hard Claim**
 - An amount that is ascertainable from the governing documents and records of the community
 - That are not subject to the Court's determination of reasonableness
 - Examples
 - Assessments
 - Late fees
 - Interest
- **Soft Claim**
 - Any amount that is permitted by the governing documents and
 - Is subject to the Court's determination of reasonableness
 - Examples
 - Attorney's fees
 - Costs of collection



Common Reasons Affidavit Judgment is Denied

- The Court can't determine the legal basis for the monetary claims made.
- Late fees calculated improperly or because non-assessment amounts are delinquent.
- Interest improperly calculated.
- Soft claims are made that are subject to the Court's determination of reasonableness and there is no factual basis for the Court to make that determination.
- Accounting mixes hard and soft claims

The Court can't determine the basis for the monetary claims made.

- The Balance Forward Conundrum
 - The Court must know the basis for the claim
 - If there is a balance forward, the Court has no way to determine composition of the balance forward
 - The balance forward may contain claims
 - Not authorized by the law.
 - Not authorized by the governing documents.
- Requests for affidavit judgment will be denied where there is an undefined balance forward that is part of the claim.



Mixing Hard and Soft Claims

- Amounts are liquidated and not subject to the Court's discretion. (Hard claims)
 - Assessments
 - Interest
 - Late charges
- Amounts are subject to the Court's determination of reasonableness (Soft Claims)
 - Attorney's fees
 - Cost of collection
- Since interest and late fees are calculated on assessments only, mixing hard and soft claims appears to overstate interest and late charges.

LATE FEES CALCULATED IMPROPERLY OR BECAUSE NON-ASSESSMENT AMOUNTS ARE DELINQUENT

- Late fees are limited to delinquent assessments.
 - Many times late fees are improperly charged if there is a balance due without regard to the source of the balance.
- Late fees may only be charged one time for any delinquent assessment payment.
 - The Court is unaware of any authority that allows late fees to be charged until the owner is current in all obligations.
 - Application back accounting cannot be used where it results in the imposition of a late fee.



Interest Improperly Calculated

- Interest is always per annum. Frequently, interest is not calculated per annum. There is a program available that calculates interest.
- The interest claim exceeds the maximum rate allowed by law
 - Condominiums: the rate is capped at 18% per annum if interest is permitted by the governing documents and, if necessary approved by resolution of the Board of Directors. If governing documents permit interest but do not specify the amount, the lesser of 18% per annum or the rate specified by resolution of directors.
 - HOAs are limited to the legal rate of interest
 - The legal rate is 6% per annum
 - Governing documents may not alter the legal rate



LEGAL BASIS FOR A CLAIM IS NOT APPARENT

- Relevant parts of the governing documents are not provided to the court.
- Claims are made for items that are not authorized by the governing documents.
- Claims for assessments, late charges and late fees (hard claims) are mixed with claims for costs of collection, attorney's fees (soft claims).
- Claims for service of process are made in amounts that exceed those amount that would have been payable to the sheriff if sheriff service was used.
- The accounting provided is inadequate.
- Claims are made for items that are not defined, e.g., "miscellaneous" or "admin."

Examples Of Problematic Paperwork

DATE	PAYMT AMT	CHECK #	DEP DT	CODE	N/A	DESCRIPTION	AMOUNT	BALANCE
010110				A1		ASSESSMENT	57.23	285.69
010610	GC UNCLAIMED 1/4/10							
012710	PER PM BEGIN DELINQ. OVER; SENT LT. NOT. - LC							
013110				01		Late Fees	10.00	295.69
013110	Action taken: 10 - LATE NOTICE							
013110				03		Admin. Fees	5.00	300.69
020110				A1		ASSESSMENT	57.23	357.92
022810				01		Late Fees	10.00	367.92
022810	Action taken: 20 - CERTIFIED NOI							
022810				03		Admin. Fees	35.00	402.92
030110				A1		ASSESSMENT	57.23	460.15
030810	180.00		2	030810	A1	ASSESSMENT	(180.00)	280.15
033010	RECD UNCLAIMED NOI							
033110	Action taken: 22 - UNSIGN/UNCLAIMD							
040110				A1		ASSESSMENT	57.23	337.38
043010				01		Late Fees	10.00	347.38
043010	Action taken: 22 - UNSIGN/UNCLAIMD							
050110				A1		ASSESSMENT	57.23	404.61
050710				03		Admin. Fees	125.00	529.61
050710	POSTING NOI FEE							
052110	RCVD AFFIDAVIT POSTED 05/16/10							
052810				01		Late Fees	10.00	539.61
052810	Action taken: 25 - GRNCD OR POSTED							
060110				A1		ASSESSMENT	57.23	596.84
060410	HO SUBMITTING PMT PLAN REQUEST							
060410	TO PM, PLZ HOLD FOR RESPONSE -AT							
061610	60.00		2	061610	A1	ASSESSMENT	(60.00)	536.84
062110	PMT PLAN, IN DELINQ FOLDER -AT							
063010				01		Late Fees	10.00	546.84
063010	Action taken: 15 - HOLD ACCOUNT							
070110				A1		ASSESSMENT	57.23	604.07
072910	126.33		2	072910	A1	ASSESSMENT	(126.33)	477.74

1. Balance Fwd
2. Late Fees not authorized by covenants
3. Admin Fees not authorized by covenants

Examples Of Problematic Paperwork

Date	Type	Code	Ref. #	Description	Charges	Payments	Balance	By
05/08/2014	Charge	BEGB		Beginning Balalnce	\$1,312.78	\$0.00	\$1,312.78	
05/08/2014	Charge	LEGL		Demand	\$75.00	\$0.00	\$1,387.78	MC
05/09/2014	Charge	COPY		Copy and Postage	\$2.49	\$0.00	\$1,390.27	JAN
05/30/2014	Charge	LATE		Late Fee	\$10.00	\$0.00	\$1,400.27	JAN
06/01/2014	Charge	ASMT		Assessment & Maintenance	\$63.86	\$0.00	\$1,464.13	JAN
06/11/2014	Charge	LEGL		Deed Research	\$60.00	\$0.00	\$1,524.13	MC
06/11/2014	Charge	LEGL		Prepare Notice of Intent to Create Lien	\$175.00	\$0.00	\$1,699.13	JAN
06/11/2014	Charge	LEGL		Process service	\$45.00	\$0.00	\$1,744.13	JAN
06/13/2014	Charge	COPY		Copy and Postage	\$4.05	\$0.00	\$1,748.18	KL
06/19/2014	Charge	LEGL		Balance statement for debt verification	\$25.00	\$0.00	\$1,773.18	KL
06/23/2014	Charge	LEGL		Draft and finalize verfication of debt letter	\$314.30	\$0.00	\$2,087.48	KL
06/30/2014	Charge	LATE		Late Fee	\$10.00	\$0.00	\$2,097.48	KL
07/01/2014	Charge	ASMT		Assessment & Maintenance	\$63.86	\$0.00	\$2,161.34	KL
07/18/2014	Charge	LEGL		Lien	\$225.00	\$0.00	\$2,386.34	KL
07/18/2014	Charge	LEGL		Lien/Release	\$110.00	\$0.00	\$2,496.34	KL
07/18/2014	Charge	LEGL		Lien owner letter	\$25.00	\$0.00	\$2,521.34	KL
07/18/2014	Charge	ASMT		August - February accelerated assessments	\$447.02	\$0.00	\$2,968.36	KL
07/18/2014	Charge	COST		Recordation tax	\$20.70	\$0.00	\$2,989.06	KL
07/18/2014	Adjustment	LEGL		Removal of legal fees for lawsuit filing only *still owed*	\$0.00	\$595.84	\$2,393.22	KL
					<u>\$2,989.06</u>	<u>\$595.84</u>	<u>\$2,393.22</u>	

What is the composition of this amount?

Examples Of Problematic Paperwork

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07/18/2014	Adjustment	LEGL	→	Removal of legal fees for lawsuit filing only *still owed*	\$0.00	\$595.84	\$2,393.22	KL

Hard claims and soft claims mixed. Legal fees “still owed” notation suggests that Plaintiff might not accept the Court’s determination of legal fees. Lien release fees charged before lien has been released.

\$2,989.06	\$595.84	\$2,393.22
?????		



Interest

- **Maryland Constitution Article III, SEC. 57.** The Legal Rate of Interest shall be Six per cent per annum, unless otherwise provided by the General Assembly.
 - There must be a statutory basis for interest in excess of 6%.
 - Condominiums— Real Prop. 11-110(e)(1) –

Any assessment, or installment thereof, not paid when due shall bear interest, at the option of the council of unit owners, from the date when due until paid AT THE RATE PROVIDED IN THE BYLAWS, not exceeding 18 percent per annum, and if no rate is provided, then at 18 percent per annum.
 - Home Owners' Associations- NO 21212121PROVISION FOR INTEREST!

Therefore, the maximum rate of interest is 6% no matter what the governing documents provide.

Interest—Continued

- Governing Document Provision HOA

6.5 Interest on unpaid Assessments. Each Assessment (or installment thereof, if payable in installments) shall bear interest on its unpaid balance from the thirtieth (30th) day after it becomes due, until paid, at the lesser of (a) the rate of twenty percent (20%) per annum, or (b) the highest rate from time to time permitted by applicable law to be charged upon the same. In addition to such interest, the Association shall be entitled to levy against the

Interest—Continued

- Interest Calculation---Not Per Annum! Wrong Rate !

UPDATED INTEREST WORKSHEET		
I.	Principal Due as of 02/28/2013 Interest is computed at 20.00 % per annum, as provided by the contract between the parties, and is calculated as follows: Interest from 08/31/2012 through 02/28/2013 181 days x \$.26	\$470.66 \$47.06
II.	Principal Due as of 02/28/2014 Interest is computed at 20.00 % per annum, as provided by the contract between the parties, and is calculated as follows: Interest from 03/01/2013 through 02/28/2014 365 days x \$.73	\$1,314.66 \$266.45
III.	Principal Due as of 01/14/2015 Interest is computed at 20.00 % per annum, as provided by the contract between the parties, and is calculated as follows: Interest from 03/01/2014 through 01/14/2015 319 days x \$1.14	\$2,047.52 \$363.66
TOTAL PRE-JUDGMENT INTEREST		\$677.17*

How did this amount accrue? Calculation treats entire amount as being due from 8/31/12.

*Plus interest accruing at the per diem rate of \$1.14 from 01/14/2015



Interest—Continued

- The Solution To Interest Rate Problems
 - Read your documents.
 - Know the law.
 - Get a program (or paralegal) that correctly calculates interest.



Tips For Successful Collections

- Claim only what the law and governing documents permit
- Read your governing documents
- Start from the last “Zero” balance or judgment
- Account for prior judgments separately and apply payments to prior judgments; submit proof of any prior judgment not yet satisfied
- Account separately for nondiscretionary (Type A) and discretionary (Type B) claims
 - Assessments, late charges and interest (nondiscretionary)
 - Costs of collection and attorney’s fees (discretionary)
- Calculate interest correctly
 - Interest is charged on each individual amount from the date that it is due
 - Use an appropriate interest calculation program
- Calculate late fees correctly
 - One late fee for any month in which a payment is missed
 - Do not use application-back accounting



Common Errors of the Defense

- Relevant portions of the governing documents are not brought to the Court's attention
- Failure to produce
 - Receipts
 - Cancelled checks
 - Other documentation of the claim
- Relying on something that was said without documentary evidence to support the reliance